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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 499

OUTBOARD MARINE CORPORATION,
Petitioner,

vs.

DONALD A. HOLLEY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION.

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Respondent, Donald A. Holley, Plaintiff-Appellee below, opposes the Petition herein for a writ of certiorari for the reasons hereafter stated.

OPINIONS BELOW.

The opinions below of the Court of Appeals and of the District Court are adequately identified in the Petition. In addition, the District Court's Findings of Fact (hereinafter called "Findings") and Conclusions of Law (hereafter called "Conclusions") appear at pp. 383-407 of Petitioner's Appendix previously filed by Petitioner in the Court of Appeals (hereafter called "Appeal Appendix").

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

The questions presented at page 3 of the Petition are not within the purview of Rule 19 of this Court. They do not have to do with matters that are so special or important as to compel decision by this Court.

Further, those questions are spurious and not in accord with the actual facts, they erroneously attribute to the Court of Appeals holdings that said Court did not make, they include assumptions which are contrary to the facts and the applicable law, and they represent nothing more than a thinly veiled disguise, the flat purpose of which is to attempt to relitigate in this Court all of the specific issues finally decided by the District Court and affirmed by the Court of Appeals on the very specific facts involved.

STATUTES INVOLVED.

The statutes and constitutional provision referred to on pages 3, 15 and 16 and at other places in the Petition are correctly quoted at pages A-1 and A-2 of the Appendix to the Petition.

STATEMENT OF THE CASE.

Respondent in no way adopts or acquiesces in Petitioner's statement of the case or alleged statement of facts appearing at pages 1 to 14 of the petition for they are interlaced with misstatements of fact, omissions of relevant and material facts, and erroneous assertions and arguments which paint a distorted picture of the actual relevant and material facts. For a true and accurate statement of

the relevant and material facts and other matters germane to this case, reference is made to the Findings and Conclusions of the District Court (Appeal Appendix, pp. 383-407), the District Court's Memorandum Opinion (Appeal Appendix, pp. 357-383), and the Opinion of the Court of Appeals (Petition Appendix A-3 to A-9). Reference is also made to the Tabulation of Relevant Findings of Fact and Conclusions of Law appearing at pages 1 to 5 of Plaintiff-Appellee's Appendix filed with the Court of Appeals giving identifying titles therefor and setting forth record citations in support thereof. We shall, in the course of the following Argument and discussion of the "Questions" presented in the Petition, point out some of these misstatements of fact, omission of relevant facts, and erroneous arguments of Petitioner.

ARGUMENT.

The Trial and Appeal Below.

The present case is an ordinary one involving such conventional issues as patent validity of a particular patent and infringement of that patent by a particular structure manufactured and sold by Petitioner, and a certain conventional business and license arrangement between Respondent and a customer.

Petitioner had a full trial before the District Court on these issues, and it presented several witnesses, including a number of technical experts, many exhibits, a number of prior art references, and various defenses with respect to such issues. It filed its proposed Findings of Fact and Conclusions of Law and an extensive brief before the District Court in which it analyzed the facts as it viewed them and in which it cited extensively what it considered to be the applicable law. The District Court, after an obviously careful study, including a full consideration of the foregoing and, also, of the testimony of witnesses, exhibits, proposed Findings of Fact and Conclusions of Law and briefs presented by Respondent, found claim 3 of the patent in suit valid in all respects and infringed and found that there was no patent misuse. As the Court of Appeals correctly stated (Petition Appendix A-6),

> "—the trial judge filed detailed findings of fact and conclusions of law which he prepared. He also filed an opinion which demonstrates that he had a clear understanding of the issues involved in this case."

The trial judge not only found the facts, which had clear support in the evidence, but he also fully considered the law cited by both Petitioner and Respondent and, indeed, he considered further adjudicated cases not cited by either of the parties.

On appeal to the Court of Appeals, Petitioner again filed extensive briefs going into great detail with respect to each of its alleged defenses. It had the opportunity and availed itself of full oral argument before the Court of Appeals. When the Court of Appeals, after a very careful consideration of all of Petitioner's contentions, affirmed the trial Court's findings and rulings, Petitioner filed a petition for rehearing, again presenting its contentions. The petition for rehearing was denied.

These concurring decisions of the District Court and of the Court of Appeals turned upon the particular facts of this case and, contrary to what Petitioner states, they will affect few others, if any, than the litigants. There is no conflict of decision nor anything of public interest or of special import here decided which would warrant review by the Court.

Petitioner's Tactics.

At the very outset of its Petition, Petitioner adopts the ploy of shock approach characterizing the ruling of the Court of Appeals as being "astonishing", that it "does not cite a single case", that it does not "discuss claim language", that it does not "correctly describe the prior art", that it "held valid a claim which reads verbatim on the device of one expired patent", that, contrary to the established law, it held that there was no misuse of the patent in suit "without citation of a single authority" or "discussion of the several opinions of this Court" and that such action by the Court of Appeals is "astounding". By this tactic, the transparently sham nature of which will be shown below, Petitioner seeks to lead this Court into granting the petition "in order to protect the public interest as well as to remedy an injustice to your Petitioner".

The actualities of the situation are that Petitioner is seeking nothing more than a review *de novo* in a desperate,

last-ditch delaying effort to avoid the consequences of its having appropriated a highly meritorious invention made by Respondent which was in no way taught by the prior art, and by which appropriation Petitioner profited from and derived the full benefits of Respondent's invention, and ultimately was brought to book with respect to such appropriation.

In affirming the trial Court, the Court of Appeals stated (Petition Appendix A-6):

> "However, we do not think any of the findings of fact are clearly erroneous but, on the contrary, are supported by substantial evidence."

This Court in numerous decisions has held that it will not review or disturb concurrent findings where there is evidence to support them or where there is no obvious or exceptional showing that they are clearly erroneous.[1] In the instant case, the Findings are supported by the evidence and Petitioner has made no showing at all, let alone an obvious or exceptional showing, that the concurrent findings are clearly erroneous or erroneous at all.

Petitioner makes no reference to the Findings (except one passing reference to Finding 22), but it is manifest that Petitioner is asking this Court to find the *facts* and to find them contrary to the Findings made by the trial Court and found by the Court of Appeals to be "supported by substantial evidence." In this connection, it

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1. *General Talking Pictures Corporation* v. *Western Electric Company*, 304 U. S. 175, 178, 179, 37 USPQ 357, 359 (1938), *Williams Manufacturing Co.* v. *United Shoe Machinery Corp.*, 316 U. S. 364, 367, 53 USPQ 478, 480 (1942), *Goodyear Tire & Rubber Co., Inc.* v. *Ray-O-Vac Co.*, 321 U. S. 275, 278, 60 USPQ 386, 388 (1944), *Universal Oil Products Co.* v. *Globe Oil & Refining Co.*, 322 U. S. 471, 473, 61 USPQ 382, 383 (1944), *Graver Tank & Mfg. Co., Inc.* v. *Linde Air Products Co.*, 336 U. S. 271, 275, 80 USPQ 451, 452 (1949), *Faulkner* v. *Gibbs*, 338 U. S. 267, 268, 83 USPQ 192, 193 (1949).

is to be noted that, in Petitioner's main brief before the Court of Appeals, Petitioner stated:

> "In this patent suit, *the controlling facts are not in dispute.* Only questions of law are involved on this appeal." (Emphasis added.)

Now, Petitioner finds it expedient to attempt, directly and indirectly, to attack the Findings by asking this Court, in effect, to retry the case and find the facts *de novo* by studying the patent in suit and the prior art, and examining the extensive testimony and exhibits, all of which have been thoroughly considered and evaluated below. This is *not* the function of this Court.

QUESTION I.

This question includes a number of built-in *assumptions* which are completely contrary to the facts and the applicable law. Manifestly, *if* a claim "is clearly void because of anticipation under 35 U. S. C. 102, because of obviousness under 35 U. S. C. 103, and also because of functionalism under 35 U. S. C. 112", it is invalid. That, however, is *not* the situation here.

In its asserted Statement of Facts, in its descriptions thereunder of the patent in suit and the three prior art patents to which it refers (Morgan, Giesler and Rayfield) and in its reference to the claim of Respondent's patent, Petitioner mingles alleged facts and its specious arguments. These alleged facts and arguments represent precisely the same approach which was found by the District Court to be contrary to and unsupported by the evidence, and which the Court of Appeals similarly found to be wanting.

Any proper understanding of the invention of the Holley patent in suit and claim 3 thereof, and of the prior art, requires at least a good factual understanding of the back-

ground of the Holley invention, of prior practices in the art of marine internal combustion engine cooling systems, the long standing and unsolved problems which existed in such latter cooling systems until the advent of the invention of the Holley patent, the substantial differences between automotive internal combustion engine cooling systems and marine internal combustion engine cooling systems in construction and manner of operation and the different nature of the problems involved in each. There was extensive testimony at the trial by expert witnesses for both Petitioner and Respondent and extensive testimony also with respect to what was actually disclosed and actually taught by the Morgan, Giesler and Rayfield patents. Based on all of such material, the District Court made a most careful study and evaluation and, in the light thereof, arrived at its detailed Findings as is apparent from its Memorandum Opinion.

To enter into a discussion of these factual matters, in relation to Petitioner's descriptions on pp. 3-14 of its Petition, and to have this Court attempt to do so would require the equivalent of a trial *de novo*. *Every* statement of alleged fact by Petitioner and *every* argument based thereon was presented in massive detail to the District Court, again to the Court of Appeals on the original appeal and once again on the Petition for Rehearing. To the extent that any statement of alleged fact by Petitioner is insufficient, incomplete or inconsistent with or contrary to the District Court's Findings, with respect to which latter it is to be noted that the Court of Appeals found them to be not only not clearly erroneous but, "on the contrary, are supported by substantial evidence", we rely upon said Findings. Is this Court, to attempt to satisfy Petitioner, to re-evaluate all of the evidence, exhibits, and testimony and to make its own findings?

Notwithstanding what has been stated above, some brief

comments are in order in regard to pp. 3-14 of the Petition so that this Court may have at least some specific idea of Petitioner's erroneous approach to the facts.

At p. 5 of its Petition, Petitioner states that a "substantial number of Petitioner's allegedly infringing units are involved in this litigation" and that "Other manufacturers of outboard motors may ultimately be involved." This latter quoted statement is purely conjectural and for which there is no support in the record of this case.

As to the first quoted statement, Petitioner again conveniently fails to apprise this Court of the relevant facts. In the first place, Petitioner dominates by far the manufacture and sale of outboard motors in the United States, accounting for a vast majority of the total (Finding 36, Appeal Appendix, p. 397). After the present suit for infringement was initiated, and at a time when Petitioner was urging that its accused marine internal combustion engines did not infringe Respondent's patent, Petitioner issued a change order which directed that the construction of its accused marine internal combustion engines be changed for the admitted purpose of "avoiding infringement" of Respondent's patent. (See footnote 5 and Finding 43, Appeal Appendix, pp. 362-363, 403). This change order resulted in Petitioner changing its construction (to avoid infringement) in the middle of a model year (the first part of 1961). Hence, Petitioner's liability for infringement in this case involves only those of its marine internal combustion engines which were made in a period of approximately two and one-half (2½) years (the model years 1959, 1960 and several months of 1961) and, further, it involves only certain ones, namely, its 5½, 10 and 18 horsepower units.

The foregoing *factual* situation serves simply to emphasize what has been stated above, namely, that the de-

cision of the Court of Appeals turned upon the particular facts of the case, that it will affect few others, if any, and even as to Petitioner it is most limited, and that there is nothing of special import here decided that warrants review by this Court.

The Patent in Suit.

At p. 5, Petitioner states that "patentee-respondent considered his invention to reside in the employment of a thermostatic valve to apportion flow between the engine cooling jacket and the bypass line." This is a completely erroneous and unwarranted oversimplification of the Holley invention. That invention is defined in claim 3 read in the light of the description in the specfication and drawings and includes the combination of the several recited coacting elements which make up the Holley marine internal combustion engine cooling system.

Petitioner, in its Statement of Facts, at pp. 3-5, purports to describe the invention of the Holley patent in suit, as defined in claim 3. Its description is inadequate, at best, and its intermingled comments and arguments comprise a composite of inadequacy and error. Any proper understanding of the Holley invention and claim 3 thereof requires, at least, background considerations and understanding of prior practices in the art of marine internal combustion engine cooling systems, the long standing and unsolved problems which existed therein, and then a study of Holley's novel solution of such problems as reflected by his patent in suit. Petitioner is utterly silent thereon. The District Court's Memorandum Opinion (Appeal Appendix, pp. 358-362), and its Findings 5-20 and 40, inclusive (Appeal Appendix, pp. 384-392, 400-402) provide some of such background material and set forth accurately the nature of the Holley invention as defined in claim 3.

The Prior Art Patents.

At pp. 6-14, Petitioner enters into a description of the subject matter of Morgan Patent 2,471,533, Giesler Patent 1,561,153 and Rayfield Patent 1,528,788, again mingling alleged fact statements with argument and, we may say, unsupportable and erroneous argument.

This is not the forum to review the facts concerning the disclosures in the aforesaid three prior art patents or Petitioner's descriptions thereof. The District Court made extensive Findings and Conclusions with respect thereto and the validity of claim 3 of the Holley patent in suit thereover, Findings 15-41 and 43 and Conclusions 2 and 4-7 (Appeal Appendix, pp. 340-403 and 404-406), and they were concurred in by the Court of Appeals. However, a few comments may be desirable.

At p. 6 with respect to the Morgan patent, Petitioner erroneously states that the valve member 48 functions exactly as the valve member of claim 3 of the Holley patent; and at pp. 9 and 11, it also erroneously states that the Morgan, Giesler and Rayfield patents each disclose "all of the elements of the claim in suit."

Morgan Patent.

The Morgan patent deals with a cooling system for a marine internal combustion engine but it is a system which is, in fact, very materially different from the Holley system. Petitioner persists in erroneously interpreting what the Morgan patent actually discloses. In this connection, reference may be made to the fact that, some years after the Holley patent issued, Petitioner itself obtained U. S. Patent 2,741,231, dated April 10, 1956 (issued in the name of Lucius D. Watkins, Director of Research of Petitioner), directed to a marine internal combustion engine

cooling system operating on the very same principle as the system of the Holley patent. In the prosecution of the patent application which resulted in the Watkins patent, the same aforesaid Morgan patent was cited as a prior art reference and on the basis of which the Watkins application was first rejected. In patentably distinguishing the Watkins system from the Morgan patent, present chief counsel for Petitioner stated:

> "Applicant's floating valve means which apportions but never shuts off circulation appears highly original in the combination claimed. It relieves the thermostat of back pressure * * *. In Morgan, the check valve 29 can open only under pressure developed when valve 48 is closed by its thermostat. There is no opening of one valve progressively as the other closes and no balance of flow to relieve the thermostat pressure." (Appeal Appendix, p. 295.)

Irgens, Petitioner's Vice-President in charge of Engineering and Research and a Director of Petitioner, agreed with this statement of Petitioner's chief counsel. The latter then communicated with Petitioner, in regard to this same matter, stating that various prior art references, including the Morgan patent, were "remote" from the Watkins system and Irgens also agreed with this (Appeal Appendix, p. 296.) Compare the foregoing characterizations of the Morgan patent with the completely different characterization which Petitioner is now urging.

Precisely the same remarks of Petitioner's present chief counsel and concurred in by Irgens apply with respect to the differences between the Holley system and the Morgan patent, differences so wide as to merit the characterization of "remote". Petitioner's complete right-about-face in regard to the "relevancy" of the Morgan patent to the Holley system, under the pressure of the exigencies of the present suit, is enough to place the facts in proper perspec-

tive. Full Findings with respect to the impertinence of the Morgan patent to, and its lack of teaching of, the subject matter of claim 3 of the Holley patent are set out in Appeal Appendix, pp. 392-393, Findings 22, 23 and 24.

Furthermore, in the chart (Petition Appendix A-11) which is not of record and at pp. 6-8, Petitioner makes no reference to and totally disregards the separate and distinct pressure operated valve 29, which is essential to the operation of the Morgan cooling system and which is not utilized in the Holley cooling system, in its zeal to paint a distorted picture of the Morgan cooling system and to equate in words, but not in substance, the Morgan cooling system with the Holley cooling system defined by claim 3 of the Holley patent. Findings 22, 23 and 24, which Petitioner substantially ignores, are supported by the evidence and Petitioner has made no showing that those concurrent Findings are erroneous, let alone clearly erroneous, to warrant this Court in reviewing or disturbing the same.

Giesler and Rayfield Patents.

As to these patents, they do not deal at all with *marine* internal combustion engine cooling systems. Rather, they are concerned with *automotive* internal combustion engine cooling systems which are different therefrom and involve different problems. Again, full Findings were made which fully expose the erroneous contentions of Petitioner, Findings 15, 16, 18, 20, 25, 26, 27, 28 and 29 (Appendix, pp. 390-395). Reference is made to these Findings for a full understanding of the *automotive* internal combustion engine cooling systems of the Giesler and Rayfield patents as compared to the *marine* internal combustion engine cooling system of the Holley patent.

Again, in the charts (Petition Appendix A-12 and A-13) which are not of record and at pp. 9 to 14, Petitioner makes

no reference to the fact that these patents have to do with *automotive* internal combustion engine cooling systems where the purpose is to continuously circulate water through the cooling radiator to minimize freezing thereof. As above, Petitioner paints a distorted picture of the Giesler and Rayfield patents and attempts to equate in words, and not in substance, the automotive *internal* combustion engine cooling systems of Giesler and Rayfield with the Holley *marine* internal combustion engine cooling system defined in claim 3 of the Holley patent. Findings 5, 15, 16, 18, 20, 26, 27, 28 and 29, which Petitioner ignores, are supported by the evidence and Petitioner has made no showing that those concurrent Findings are erroneous, let alone clearly erroneous, to warrant this Court in reviewing or disturbing the same.

Petitioner's Arguments.

The alleged defenses of anticipation under 35 U. S. C. 102, of obviousness under 35 U. S. C. 103 and of functionalism under 35 U. S. C. 112 (Appeal Appendix 357) and the arguments with respect thereto at pp. 19-25 of the Petition were presented in great detail to the District Court, again to the Court of Appeals and once again on the Petition for Rehearing. They were given careful consideration but were properly rejected as being without merit. Many of the cases here cited by Petitioner were also previously presented to and considered by the District Court and the Court of Appeals. We have no quarrel with the pronouncements of the various cases cited by the Petitioner, but they are not germane to the particular facts of this case.

In addition to making its detailed Findings and Conclusions which are fully supported by the evidence, the trial Court prepared a comprehensive Memorandum Opinion, discussing in detail the above mentioned alleged defenses and numerous decisions, including some of those

here again being urged by Petitioner (Appeal Appendix, pp. 363-371 and 374-375), as, for example, *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147, 87 USPQ 303 (1950) and *General Electric Co.* v. *Wabash Appliance Corp.*, 304 U. S. 364, 37 USPQ 466 (1938). It is clear that the trial Court, in addition to finding the facts of this case, applied the correct legal criteria to those facts, properly rejected the aforementioned alleged defenses, and held claim 3 of the patent in suit to be valid in all respects.

Further, the *General Electric* v. *Wabash* and the *Halliburton* v. *Walker* cases, cited at p. 24 of the Petition and previously cited to the trial Court and the Court of Appeals, have on numerous occasions been discussed and distinguished in the reported cases and it is clear that those cases are not applicable here. For example, reference is made to this Court's opinion in *Faulkner* v. *Gibbs*, 338 U. S. 267, 83 USPQ 192 (1949), a case particularly in point here, wherein this Court stated:

> "The record, briefs and arguments of counsel lead us to the view that Halliburton, *supra*, is inapposite. We there held the patent invalid because its language was too broad at the precise point of novelty. In the instant case, the patent has been sustained because of the fact of combination rather than the novelty of any particular element."

In the instant case, claim 3 of the Holley patent (Finding 40, Appeal Appendix, pp. 400-402) is a combination claim for a marine internal combustion engine cooling system including a new combination of elements.

With regard to Petitioner's charges at page 1 and elsewhere in the Petition that the Court of Appeals did not discuss the claim language and did not cite a single case, Findings 5, 8, 9 and 10 describe the marine engine cooling system of the Holley patent (Appeal Appendix, pp. 384-

389), Finding 40 sets forth the claim elements of claim 3 of the Holley patent and how they find response in the Holley patent (Appeal Appendix, pp. 400-402), and the trial Court in its Memorandum Opinion cited numerous cases in connection with its holding claim 3 of the Holley patent valid in all respects (Appeal Appendix, pp. 363-375).

The Court of Appeals made specific reference to the detailed Findings and Conclusions and the opinion of the trial Judge "which demonstrates that he had a clear understanding of the issues involved in this case" (Petition Appendix A-6), made specific reference by number to Findings 5, 8, 9, 10 and 40 and to the construction of claim 3 (Petition Appendix, A-7) and affirmed the trial Judge as to validity of the Holley patent in suit (Petition Appendix, A-8 and A-9).

As an appellate Court, it was charged with two fundamental functions. The first of these was to ascertain whether the relevant facts or those facts which were controlling on the determination of the issues were correctly found by the District Court and, in this connection, it was guided by Rule 52 (a) of the Federal Rules of Civil Procedure, which states in part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The second of these functions was to ascertain whether the correct law was applied to the facts.

As to the first function, over and above Petitioner's flat assertion to the Court of Appeals that "the controlling facts are not in dispute", the Court Appeals found said facts to be "supported by substantial evidence."

As to the second function, it found that the District Court had applied the correct legal criteria. This did not call

for its repeating the citation of the same cases and the same reasoning upon which the District Court reached its conclusions.

QUESTION II.

Neither is there any substance to the alleged defense of unenforceability or patent misuse. The judgment below does not sanction an unlawful practice of extending a patent monopoly by requiring the purchase from Respondent, Holley, of unpatented articles. This alleged defense, which was not a joined issue at the trial,[2] has to do with a relationship between Respondent and Chris-Craft Corporation. The relevant facts with respect to this relationship are set forth in Findings 11 to 14 and 46 to 50 (Appeal Appendix, pp. 389-390 and 403-404). Reference to these Findings and to Pl. Ex. 32 (Petition Appendix, A-34 to A-35) is here made for a clear understanding of the facts here involved.

Based on the foregoing facts, Pl. Ex. 32 and the relevant testimony of Respondent, Holley (Appeal Appendix, pp. 74, 110, 118), the trial Court found, among other things, in Finding 47 that, "By the terms of the agreement, Chris-Craft Corporation is not required to purchase thermostat control assemblies from plaintiff for use in the housings it manufactured in order to obtain a license under the patent in suit" and in Finding 50 that, "The record does

2. Petitioner regarded this "defense" as so unmeritorious that it did not have it included in the pretrial stipulation setting forth the issues to be tried by the District Court. In the midst of the trial, it brought up this defense, under circumstances which made it impossible for Respondent to present a full response thereto. (Plaintiff-Appellee's Appeal Appendix, pp. 7-15.) Even so, on the basis of the evidence presented, which the District Court fully considered, the defense was found to be without merit.

not support defendant's contention that plaintiff has misused his patent so as to make it unenforceable against defendant." Also, see the Memorandum Opinion of the Trial Court (Appeal Appendix, pp. 380-383). The Court of Appeals in its decision (Petition Appendix, A-8 to A-9) correctly and fully affirmed the trial Court on the particular facts here involved.

At page 14 of its Petition, Petitioner makes a partial quotation from Pl. Ex. 32, and at page 26 in the italicized partial quotation "*exclusively used . . . thermostats furnished by me*" deletes the important words "*in such housings*". Also, at page 26, Petitioner quotes in footnote 20 only a part of Holley's testimony and prefaces the quotation with a self serving argumentative statement which is not supported by and which is contrary to the actual fact. Further, at page 27 of its Petition, Petitioner quotes only one sentence from the Opinion of the Court of Appeals in its affirmance of the trial Court in holding that there was no misuse of the Holley patent in suit. There was no patent misuse and the Courts below did not rely on "business convenience" as a justification for patent misuse. Petitioner does not face up to the Findings affirmed by the Court of Appeals or the pronouncements of the trial Court and the Court of Appeals in their opinions in rejecting the asserted defense of alleged misuse of the Holley patent in suit.

By these tactics, Petitioner disregards the concurrent Findings, and attempts to paint a picture which is contrary to the actual facts and to erroneously read into Pl. Ex. 32 a requirement that Chris-Craft had to buy thermostats from Respondent in order to obtain a license under the Holley patent in suit. Pl. Ex. 32 does not say so, the trial Court and the Court of Appeals in view of all of the facts found to the contrary in concurring find-

ings, and when the precise question was placed to Respondent, Holley, on cross-examination, he testified, "No they don't have to buy them from me, no." There is no merit in this alleged defense. The *B. B. Chemical* v. *Ellis* case cited at page 27 of the Petition is not pertinent to the particular facts here involved.

QUESTION III.

This question presented at p. 3 of the Petition has been well covered in the discussion above. We agree that this Court should exercise its supervisory responsibility to ensure compliance with the authoritative pronouncements of this Court. However, the rulings of the Courts below in this case are *not* contrary to the applicable law as announced in the decisions of this Court and the applicable law announced in decisions of this Court has not been disregarded below, whether with or without discussion or citation of authority. Petitioner has not established anything to the contrary in its Petition.

CONCLUSION.

The record in this case shows that Respondent is an individual running a small one-man concern having gross annual sales of about $7,000. Applying himself to attempting to solve a problem, which Petitioner's own expert witness Watkins admitted had long vexed those skilled in the art, and which remained unsolved, Respondent hit upon the invention which is the subject matter of his patent involved in this case.

Knowing of the long felt need for a thermostatically controlled marine engine cooling system, Petitioner began experiments in 1943 with several less satisfactory systems, and after Respondent had disclosed his invention in 1952

to Petitioner, Petitioner came out on the market in the fall of 1958 with its infringing marine engines (outboard motors) incorporating the invention of Respondent's patent in suit (Findings 19, 32, Appeal Appendix, pp. 391-392, 396). In so doing, Petitioner extolled the virtues of the thermostatically-controlled system of its infringing marine engines by advertising and sales promotion (Finding 35, Appeal Appendix, p. 397). Some typical quotations therefrom demonstrating the merit of Respondent's invention are:

> "And now the new thermostat-controlled cooling system brings the Sea-horse 10 even longer life and smoother performance!" (D. Ex. 38-1)
>
> "Big in dependability and long-life features, too, with its wonderful thermostat-controlled cooling system that does away with outboard 'chills and fevers.' Easy does it whether you're in the cold, cold waters of Lake Tahoe, or the tepid jungles of the Everglades." (D. Ex. 38-2)
>
> "Among the many new features is Evinrude's thermostatically controlled cooling system, a major advancement that assures smooth operation and peak efficiency always." . . . "The thermostatically controlled cooling system assures complete combustion at even the slowest trolling gait, and the nuisance of rapid spark plug fouling at low operating speeds is eliminated." (D. Ex. 38-3)
>
> "'Hottest' fishing news for '59!—Longer Spark Plug Life—Smoother Operation—Extra Fuel Savings —Less Rust and Salt Corrosion—Longer Engine Life." (D. Ex. 38-8)
>
> "Biggest break-through in years . . . thermostat-controlled engines!" (D. Ex. 38-11)

In seeking to enforce his rights against Petitioner's flat and outright appropriation of his meritorious invention, Respondent has been met with every obstacle which a powerful infringer, armed with unlimited funds, has the

will and ingenuity to present. The present petition is but another effort to attempt to delay the time when Petitioner must account for its appropriation of Respondent's property right in his patent and to continue to make it as difficult as possible for Respondent.

While Petitioner speaks of protecting the "public interest" and remedying "an injustice" to Petitioner, its actions of appropriating Respondent's meritorious invention and using its abundant resources to the utmost to delay at best, and to avoid at worst, being brought to account therefor, represent an utter thwarting of justice. Petitioner's sole and only interest is to avoid its own liability for its flagrant infringement.

The Petition is without merit and should forthwith be denied.

Respectfully submitted,

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